

## REVISED RESPONSE TO COMMENTS

### RECISSION OF DECEMBER 1, 2020, ESTABLISHMENT OF THE WATER QUALITY CONTROL PLAN FOR INLAND SURFACE WATERS, ENCLOSED BAYS, AND ESTUARIES OF CALIFORNIA AND CONFIRMATION THAT THE “TOXICITY PROVISIONS” WERE ADOPTED AS STATE POLICY FOR WATER QUALITY CONTROL FOR ALL WATERS OF THE STATE

Originally released on September 21, 2021.

Revised on September 30, 2021.

### STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2021-

As described in the table below, the State Water Resources Control Board (State Water Board) received seven comment letters by the July 27, 2021 noon deadline regarding the proposed Resolution for the Recission of December 1, 2020, Establishment of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWEBE Plan) and Confirmation that the “Toxicity Provisions” Were Adopted as State Policy for Water Quality Control for All Waters of the State (proposed Resolution).

Revisions to the September 21, 2021 Response to Comments were made to add a response to the comment letter submitted by the Los Angeles Department of Water and Power (Letter #7), which was inadvertently omitted in the September 21, 2021 version.

All written comment letters are available upon request by contacting Zane Poulson at [Zane.Poulson@waterboards.ca.gov](mailto:Zane.Poulson@waterboards.ca.gov). Responses to these comment letters (hereinafter known as the Revised 2021 Response to Comments) are below. Responses to previous comment letters are available on the [Statewide Toxicity Provisions web page](#).

Number	Commenter(s)	Submitted by:
1	Central Valley Clean Water Association	Debbie Webster
2	Kahn, Soares & Conway, LLP on behalf of the California Rice Commission East San Joaquin Water Quality Coalition Kings Water Quality Coalition Authority Kern Water Quality Coalition Authority Westside San Joaquin River Watershed Coalition	Theresa Dunham
3	Downey Brand, LLP on behalf of the Southern California Alliance of Publicly Owned Treatment Works (SCAP)	Melissa Thorne
4	General Public	Robyn Stuber
5	California Coastkeeper Alliance Heal the Bay	Kaitlyn Kalua Annelisa Moe

Number	Commenter(s)	Submitted by:
6	City of San Diego, Public Utilities and Storm Water Department	Sumer Hasenin
7	Los Angeles Department of Water and Power (LADWP)	Katherine Rubin

**Comment Letter #1 – Central Valley Clean Water Association (Debbie Webster)**

1.1. **COMMENT:** “CVCWA is concerned that, while the Toxicity Provisions will apply to waters of the state that are not also waters of the United States under the Clean Water Act, and supersede conflicting provisions in WQCPs adopted by regional water boards, the provisions are not being properly adopted as part of a WQCP that originates from a regional water board. For the reasons articulated here, CVCWA requests that the State Board reevaluate the proposed action and the supporting rationale, and instead proceed to adopt the Toxicity Provisions in accordance with the intent and purposes of the Porter-Cologne Water Quality Control Act (Porter-Cologne). From a procedural standpoint, this means that the State Board may only adopt the Toxicity Provisions as a WQCP for waters of the United States and must defer any action to the regional water boards for the adoption of the Toxicity Provisions as they would apply to waters of the state that are not waters of the United States (non-waters of the United States).”

**RESPONSE:** Deferring action on the Toxicity Provisions is not necessary. The Water Code does not limit the State Water Board’s discretion to rely on both its policy and plan authority. Furthermore, the Toxicity Provisions are within the scope of actions contemplated in the Porter-Cologne Water Quality Control Act (Porter-Cologne) for state policy for water quality control under the authority of Water Code section 13140. For further response, see Revised 2021 Response to Comments numbers 1.2 through 1.4.

1.2. **COMMENT: “Legal Background**  
 “The State Board also has authority to adopt WQCPs that include the designation of beneficial uses, water quality objectives, and programs of implementation. The reach of this authority is limited, however, to waters for which water quality standards are required by the Clean Water Act. (Wat. Code, § 13170; *San Joaquin Tributaries Authority v. California State Water Resources Control Board* (2019) Sacramento County Superior Court, Case No. 34-2019-80003133, Combined Final Ruling re Petition for Writ of Mandate/Complaint for Declaratory Relief; Demurrer to Petition/Complaint (Dec. 4, 2020) (*San Joaquin Tributaries Authority*), Page 4 of 13 [‘Section 13170 only authorizes the State Board to formulate WQCPs for waters of the United States, not other waters subject to Porter-Cologne’].)

“Separate and apart from adopting WQCPs for waters of the United States, the State Board does have the authority to adopt statewide policy for water quality control. (Wat. Code, § 13140.) However, there are distinct differences between policies adopted pursuant to Water Code section 13140 and WQCPs adopted pursuant to Water Code section 13240 et seq. ‘The difference between the policies under Section 13140 and

WQCPs is even clearer when considering the disparate elements comprising each. WQCPs consist of beneficial uses to be protected, water quality objectives that protect such uses, and a program of implementation. [Citations.]’ (*San Joaquin Tributaries Authority*, page 5 of 13.)

“When adopting statewide control policies, the State Board may include ‘[w]ater quality objectives at key locations for planning and operation of water resource development projects and for water quality control activities.’ (Wat. Code, § 13142(b).) However, beyond including water quality objectives for water resource development projects, the State Board does not have authority to adopt WQCPs that include non-waters of the United States. (*San Joaquin Tributaries Authority*, page 5 of 13 [‘In short, it is clear from the statutory text that a policy established pursuant to Section 13140 may not serve as a WQCP’].)

**“The Resolution to Adopt Toxicity Provisions Under Water Code Section 13140 et seq. Is not Consistent With Porter-Cologne**

Because Porter-Cologne limits the State Board’s authority to adopt WQCPs for non-waters of the United States, State Board staff now recommend that the State Board convert its previous adoption of the Toxicity Provisions to adoption of the same provisions as state policy for water quality control under Water Code section 13140 et seq. This proposed action suffers from the same infirmities as the State Board’s previous action on the Wetlands Policy that was enjoined by the Sacramento Superior Court in the *San Joaquin Tributaries Authority* case, as it applies to non-waters of the United States.

“Moreover, in contrast to the Wetlands Policy where a similar conversion action was taken via resolution, the Toxicity Provisions here include water quality objectives that apply to all surface waters, identify the applicable beneficial uses to which the objectives apply, and contain a detailed Program of Implementation. In other words, the elements of the Toxicity Provisions are precisely those that are part of a WQCP. (Wat. Code, § 13050(j).) Yet the Toxicity Provisions are not within the scope of actions contemplated in Porter-Cologne for state policy for water quality control.

“Section 13142 asserts that state policy for water quality control shall consist of all or any of the following: ‘(a) ... principles and guidelines for long-range resource planning, including groundwater and surface water management programs and use of recycled water[;] (b) [w]ater quality objectives at key locations for planning and operation of water resource development projects and for water quality control activities[;] [or] (c) [o]ther principles and guidelines deemed essential by the State Board for water quality control.’ (Wat. Code, § 13142.) There is no reference to beneficial uses and programs of implementation for meeting water quality objectives.”

**RESPONSE:** The comment misconstrues the scope of the Superior Court’s decision in *San Joaquin Tributaries Authority v. California State Water Resources Control Board*. On January 26, 2021, the Superior Court issued a judgment and writ enjoining the State Water Board from applying the ‘State Wetland Definition and Procedures for Discharges

of Dredged or Fill Material to Waters of the State' ("the Procedures") via the ISWEBE Plan to non-federal waters. The court did not limit the State Water Board's policy authority or prohibit the Board from relying on both Water Code section 13170 and 13140 authority in conjunction. Subsequent to issuing the judgment and writ, the Superior Court in *San Joaquin Tributaries Authority v. California State Water Resources Control Board*, over objections by San Joaquin Tributaries Authority, confirmed that the State Water Board's April 6, 2021 resolution complied with its judgment and writ. In particular, the Superior Court explained the scope of its decision as follows: "This court concluded that the State Water Board's policymaking authority pursuant to Section 13140 did not extend to the enactment or amendment of water quality control plans. But the court did not consider whether or the extent to which the Procedures may serve as statewide water quality policy." (*Notice of Entry of Orders Discharging Writ and Denying Motion for Attorneys Fees*, Exhibit B, page 3 (filed June 8, 2021).)

The proposed Resolution confirms that the Toxicity Provisions were adopted as a state policy for water quality control for all inland surface waters, enclosed bays, estuaries, and coastal lagoons of the state, regardless of their status as waters of the United States, under the authority of Water Code section 13140 and confirms that the Toxicity Provisions will also continue to apply to waters of the United States and will in the future be incorporated into the ISWEBE Plan for waters of the United States under the authority of Water Code 13170. Accordingly, the Toxicity Provisions will continue to apply to all inland surface waters, enclosed bays, estuaries, and coastal lagoons of the state as state policy for water quality control. Likewise, the proposed revisions to the Toxicity Provisions set forth in Attachment 1 would be adopted as state policy for water quality control for all inland surface waters, enclosed bays, estuaries, and coastal lagoons of the state, and for future incorporation into the ISWEBE Plan for waters of the United States, under the authority of Water Code sections 13140 and 13170.

The Water Code does not limit the State Water Board's discretion to rely on both its policy and plan authority. There is no indication in the language of the Water Code or in the legislative history of an intent to limit the State Water Board's discretion to rely on both its policy and plan authority when deemed appropriate to achieving its designated mission of protecting water quality. The State Water Board satisfied the requirements for both a policy under section 13140 and a plan under section 13170.

To be clear, the Toxicity Provisions as adopted on December 1, 2020, did not designate or define beneficial uses. The ISWEBE Plan as established on December 1, 2020, did include a sentence incorporating by reference beneficial uses from other water quality control plans, but that sentence is proposed for deletion due to the proposed rescission of the establishment of the ISWEBE Plan. Furthermore, the Toxicity Provisions are within the scope of actions contemplated in Porter-Cologne for state policy for water quality control under the authority of Water Code section 13140. State policies for water quality control can at a minimum include "[o]ther principles and guidelines deemed essential by the State Board for water quality control." (Wat. Code, § 13142.) "Water quality control" is defined in the Water Code as "the regulation of any activity or factor which may affect the quality of the waters of the state and includes the prevention and

correction of water pollution and nuisance." (Wat. Code, § 13050(i).) The components of the Toxicity Provisions, including the water quality objectives and the program of implementation, set forth principles and guidelines that are essential for a clear and consistent interpretation and application of what is considered unacceptable toxicity, to protect California's waters from both known and unknown toxicants, and to ensure protection of aquatic life beneficial uses.

Including specific mandatory implementation requirements in state policy for water quality control is not precluded by the terms of Water Code section 13140 or any authority cited by commenters; rather, it is consistent with the State Water Board's longstanding interpretation of its section 13140 authority. The State Water Board has included specific implementation requirements in several other state policies for water quality control, including, as examples, the *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* (State Water Board Resolution No. 2005-0019); *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304* (State Water Board Resolution No. 96-079); *Water Quality Control Policy for Siting, Design, Operation, and Maintenance of Onsite Wastewater Treatment Systems* (State Water Board Resolution No. 2012-0032); and the *Cannabis Cultivation Policy – Principles and Guidelines for Cannabis Cultivation* (State Water Board Resolution No. 2019-0007).

As already explained in the Staff Report, Including Substitute Environmental Documentation for State Policy for Water Quality Control: Toxicity Provisions (Staff Report) and prior responses to comments, the Toxicity Provisions are necessary and appropriate to ensure the protection of aquatic life from toxic effects. For these same reasons, the State Water Board is determining that the Toxicity Provisions are essential for water quality control. Language has been added to the proposed Resolution to clarify that the Toxicity Provisions are deemed essential by the State Water Board for water quality control.

- 1.3. **COMMENT:** "The Proposed Resolution asserts that the State Board has the authority to regulate the discharge of waste to all waters of the state under its authority to adopt state policy for water quality control. (Proposed Resolution, p. 2, ¶ 5.) However, waste discharge requirements adopted via Water Code section 13263 must implement any relevant WQCPs. (Wat. Code, § 13263(a).) No reference is made to state policy for water quality control. At a minimum, waste discharge requirements would need to be consistent with state policy, but only *after* it has been incorporated into the relevant WQCP. Adoption of such state policy does not provide independent authority to regulate discharges of waste outside of the normal procedures and processes set forth in Porter-Cologne."

**RESPONSE:** The Water Boards' role in adopting waste discharge requirements under Water Code section 13263 does not limit the State Water Board's authority under Water Code section 13140. Pursuant to Water Code section 13146, "State offices, departments and boards, in carrying out activities which affect water quality, shall

comply with state policy for water quality control unless otherwise directed or authorized by statute, in which case they shall indicate to the state board in writing their authority for not complying with such policy.” This section applies to the Regional Water Quality Control Boards (Regional Water Boards). (Cf. *State Water Resources Control Bd. Cases* (2006) 136 Cal. App. 4th 674, 730 [interpreting analogous language in Water Code section 13247 as applying to the State Water Board].) The commenter has provided no support for the assertion that a Regional Water Board does not need to comply with state policy for water quality control unless and until it incorporates the state policy into its water quality control plan, despite the lack of any such qualifier in section 13146. Section 13240 also requires that water quality control plans conform to state policy for water quality control, but it does not identify the timing or mechanism for conforming the water quality control plans. In fact, it has been the longstanding interpretation of the State Water Board and the Regional Water Boards that these statutes, when read together, require the Regional Water Boards to comply with state policies for water quality control as directed by the terms of the state policy in question, whether or not the Regional Water Board has explicitly incorporated the state policy into the Regional Water Board’s water quality control plan. Furthermore, the State Water Board has ultimate oversight of the regions and to control and protect the quality of all waters of the state. (Wat. Code, §13000.) Regional administration is to take place within a “framework of statewide coordination and policy.” (Wat. Code, §13000; see also *WaterKeepers Northern Cal. v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1452 [“waste discharge requirements [issued by Regional Water Boards] implement state policy...”].) The Toxicity Provisions acknowledge this structure through requirements to be implemented by the permitting authority (the State Water Board or Regional Water Board) when adopting waste discharge requirements. The State Water Board’s intent that the Toxicity Provisions would be implemented by the Regional Water Boards upon the effective date of the Toxicity Provisions, and also would supersede otherwise applicable Regional Water Board water quality control plan (also known as a “basin plan”) provisions at that time is specifically demonstrated in the proposed Resolution and in the language of the Toxicity Provisions. Thus, the Water Boards will administer the Toxicity Provision within the statewide framework established by the State Water Board.

- 1.4. **COMMENT:** “The State Board’s reliance on *WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448 (*Waterkeepers*) to support the proposed action is misplaced. As part of the rationale for using Water Code section 13140 et seq., the Draft Resolution and Revised Draft Final Report cite *Waterkeepers* as legal authority for the premise that state policy can supersede conflicting provisions in regional WQCPs. *WaterKeepers*, however, does not support this conclusion. On appeal, the case addressed a single issue in the State Implementation Policy for Toxics dealing with compliance determinations for entities subject to NPDES permits (i.e., discharges to waters of the United States). The court construed the minimum level provisions in question very narrowly for the purposes of defining reporting requirements and providing a guideline for enforcement. (*Id.* at p. 1460.) Based on this narrow reading of the provisions, the court then determined it reasonable to find that the State Board intended these provisions to apply to regional board compliance determinations

and supersede conflicting basin plan provisions. (*Ibid.*) Nothing in this case suggests that the State Board may adopt new water quality objectives and programs of implementation for non-waters of the United States as state policy and have these provisions then supersede conflicting provisions in regional board WQCPs. Accordingly, the State Board may not rely on the *WaterKeepers* case to support use of section 13140 as a means for adopting WQCP-like provisions for non-waters of the United States.”

**RESPONSE:** While state policies for water quality control do not automatically supersede basin plans as a matter of law, the State Water Board’s longstanding interpretation of the relevant sections of the Water Code is that state policies for water quality control may supersede conflicting basin plan provisions on a case-by-case basis, dependent upon the actual terms of the state policy for water quality control. The Court of Appeal in *WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448 (*Waterkeepers*) recognized the validity of specific terms in a state policy for water quality control that provided that the state policy for water quality control superseded basin plan provisions that addressed the same subjects as the state policy for water quality control. (*Waterkeeper* at p. 1460.) While the Court of Appeal’s recognition of the State Water Board’s interpretation that state policies for water quality control can supersede basin plans was not a holding of the decision, it was an important part of the analysis that led to the Court of Appeal’s resolution of the case. Further, there is nothing in the decision that suggests that the Court of Appeal’s analysis of the particular state policy for water quality control in question would have been different if the state policy for water quality control had addressed non-federal waters of the state. The intent that the Toxicity Provisions would supersede applicable regional basin plan provisions is specifically demonstrated in the proposed Resolution and in the language of the Toxicity Provisions. See also Revised 2021 Response to Comments number 1.3.

1.5. **COMMENT: “Adoption of State Policy for Water Quality Control Is Not Exempt from the California Environmental Quality Act (CEQA)**

Another issue of concern is that the proposed action would continue to rely on the previously adopted Substitute Environmental Documentation (SED). Adoption of the Toxicity Provisions as a statewide policy is not within the scope of the exemptions provided under CEQA for adoption of WQCPs. Water quality control plans alone enjoy the exemption for Certified State Regulatory programs under CEQA regulations at Public Resources Code section 15251(g). Without that regulatory exemption, the State Board must fully comply with CEQA and cannot rely on the SED.”

**RESPONSE:** Public Resources Code section 21080.5 provides the Secretary for Resources to certify the regulatory programs of the Water Boards which the Secretary finds comply with specified statutory criteria. Regulatory programs are described generally as including “the adoption or approval of standards, rules, regulations or plans for use in the regulatory program.” (Cal. Pub. Res. Code § 21080.5(b)(2).) The Water Quality Control (Basin)/208 Planning Program of state and regional boards has been certified as an exempt regulatory program by the Secretary for Resources. The Resources Agency confirmed that state policies for water quality control are within the

scope of the certified regulatory program, indicating that “[i]ncluded within the ambit of the Secretary's certification decision, although not referenced specifically, are the Water Code provisions which provide for the State Board to set state water quality policy and to provide direction for the preparation of basin plans.” (Christina Sproul, Assistant Secretary, Legal Affairs, Office of the Secretary, Resource Agency of California, mem. to Andy Sawyer, Office of Chief Counsel, State Water Resource Control Board, September 7, 1989.). This conclusion is consistent with the State Water Board’s regulation identifying the scope of its certified program as including “the Water Quality Control (Basin)/208 Planning Program of the state board and regional boards, and includes all water quality control plans, state policies for water quality control, and all components of California's water quality management plan as defined in Code of Federal Regulations, title 40, sections 130.2(k) and 130.6.” (Cal. Code of Regs, tit. 23, section 3775.)

The proposed Resolution confirms that the December 1, 2020 Toxicity Provisions were adopted as a state policy for water quality control for all inland surface waters, enclosed bays, estuaries, and coastal lagoons of the state, regardless of their status as waters of the United States under the authority of Water Code section 13140, and confirms that the Toxicity Provisions will also continue to apply to waters of the United States and will in the future be incorporated into the ISWEBE Plan for waters of the United States under the authority of Water Code 13170. The proposed Resolution does not change any of the substance or scope of applicability of the Toxicity Provisions as adopted by the State Water Board on December 1, 2020, so it will have no effect on the environment beyond the effects already identified and analyzed by the State Water Board when it adopted the Toxicity Provisions on December 1, 2020. The State Water Board’s adoption of the proposed resolution is therefore not subject to the California Environmental Quality Act (CEQA). The regulations applicable to the State Water Board’s certified exempt regulatory programs set forth in California Code of Regulations, title 23, Chapter 27 are not applicable because Chapter 27 “does not apply if the board determines that the activity is not subject to CEQA.” (Cal. Code of Regs., tit. 23, § 3720(b).)

Even if this action is subject to CEQA, the State Water Board has already complied with the regulations applicable to its certified exempt regulatory programs. The State Water Board approved the Substitute Environmental Documentation (SED) in Resolution No. 2020-0044. In the SED, which was prepared in accordance with the provisions applicable to the State Water Board’s CEQA certified regulatory programs, California Code of Regulations, title 23, sections 3777 through 3779, that accompanied the Toxicity Provisions, the State Water Board considered the effects to the environment that would result from applying the Toxicity Provisions to all waters of the state. The State Water Board is not required to conduct further CEQA documentation because the proposed Resolution does not create substantial changes in the project that would require major revisions of the SED, there are no substantial changes in the circumstances under which the project is being undertaken that would require major revisions in the CEQA documentation, and there is no new information of substantial

important to the project that was not known or could not have been known at the December 1, 2020 adoption meeting.

1.6. **COMMENT: “Conclusion**

In summary, the proposed action to rescind the Toxicity Provisions as originally adopted and re-adopt them as a state policy for water quality control is inconsistent with Porter-Cologne. The proposed action and rationale attempt to expand State Board authority beyond its statutory limitations, in that the Proposed Resolution seeks to adopt what is in essence a WQCP for non-waters of the United States. Only the regional boards have authority to adopt the elements of a WQCP applicable to non-waters of the United States. Accordingly, the State Board should not proceed with the Proposed Resolution and should instead direct staff to remove all references to any non-waters of the United States from the Toxicity Provisions.”

**RESPONSE:** The proposed Resolution only rescinds the State Water Board’s action to establish the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California. It does not rescind the Toxicity Provisions. The proposed Resolution confirms that the Toxicity Provisions were adopted as a state policy for water quality control for all inland surface waters, enclosed bays, estuaries, and coastal lagoons of the state under the authority of Water Code sections 13140, and confirms that the Toxicity Provisions will continue to apply to waters of the United States and will in the future be incorporated into the ISWEBE Plan for waters of the United States under the authority of Water Code 13170. As further explained in Revised 2021 Response to Comments numbers 1.1 through 1.4, it is not necessary to remove references to any non-waters of the United States from the Toxicity Provisions.

**Comment Letter #2 – Kahn, Soares & Conway (Theresa Dunham)**

2.1. **COMMENT:** “On behalf of the California Rice Commission, East San Joaquin Water Quality Coalition, Kings Water Quality Coalition Authority, Kern Water Quality Coalition Authority and Westside San Joaquin River Watershed Coalition, we appreciate the opportunity to review and provide comments on the proposed resolution (Draft Resolution) that would rescind Establishment of the Water Quality Control Plan for the Inland Surface Waters, Enclosed Bays, and Estuaries of California and Confirmation that the ‘Toxicity Provisions’ were Adopted as State Policy for Water Quality Control for All Waters of the State (Toxicity Provisions). Although the aforementioned irrigated agricultural coalitions have not been actively involved in the State Water Resources Control Board’s (State Board) development and adoption of the Toxicity Provisions, we have been monitoring adoption of the Toxicity Provisions as well as other State Board actions relative to its authority to adopt water quality control plans for waters of the state that are not also waters of the United States under the Clean Water Act. For the irrigated agricultural coalitions, this action has real impact in that many water channels within irrigated agricultural areas are agricultural drains or agricultural conveyance facilities that may be considered surface waters of the state<sup>1</sup> but are not Waters of the United States.

“Footnote 1: Our comment here should not be interpreted as meaning that we agree such facilities are in fact waters of the state. Rather, we recognize that each agricultural drainage facility needs to be evaluated on its individual facts to determine if it is a water of the state, or an unregulated facility that is neither a water of the state or water of the United States.”

**RESPONSE:** Comment noted.

2.2. **COMMENT:** “In summary, we are concerned that the State Board’s actions here relative to the Toxicity Provisions may extend beyond these provisions by creating a precedent that undermines regional board authority for being the primary entity responsible for developing and adopting water quality control plans for waters of the state within their region. We are concerned that the rationale used by the State Board for this action opens the proverbial door for future actions whereby the State Board will use its general state policy for water quality control to supersede conflicting provisions in water quality control plans adopted by regional boards. The State Board’s use of their general state policy for water quality control to adopt water quality objectives and programs of implementation for waters of the state that are not also Waters of the United States is inconsistent with the intent and purposes of the Porter-Cologne Water Quality Control Act (Porter-Cologne).”

**RESPONSE:** The State Water Board was created and given the broad authority and responsibility to protect water quality in all waters of the state. The intent and purposes of Porter-Cologne did not include limiting the State Water Board’s authority over waters of the state that are not also waters of the United States. Although the Legislature determined that due to variations in conditions between regions, water quality control should be “administered” regionally, the State Water Board has ultimate oversight of the regions. (§13000.) Regional administration is to take place within a “framework of statewide coordination and policy.” (Wat. Code, §13000.) The Regional Water Boards have the authority to develop region-specific water quality control plan amendments, subject to the State Water Board’s approval. However, when the State Water Board determines that a consistent approach for addressing any particular water quality issue is warranted, the State Water Board has used its statewide authorities. For further explanation on how the State Water Board can make a determination to have the Toxicity Provisions, as a state policy for water quality control, supersede provisions of regional water quality control plans, see Revised 2021 Response to Comments numbers 1.2, 1.3, and 1.4.

2.3. **COMMENT:** “**Legal Background**  
Under Porter-Cologne, a water quality control plan consists of beneficial uses to be protected, water quality objectives and a program of implementation for achieving water quality objectives. (Wat. Code, §13050(j).) Regional water boards are required to adopt

water quality control plans for all areas within the region, and the plans shall include water quality objectives that will ensure the reasonable protection of beneficial uses and programs of implementation to achieve the objectives. (Wat. Code, §§13240 et seq.) Water quality control plans adopted by regional boards do not become effective until they have been approved by the State Board. (Wat. Code, §13245.).

“The State Board’s authority to adopt water quality control plans that includes the designation of beneficial uses, water quality objectives and programs of implementation is limited to waters for which water quality standards are required by the Clean Water Act. (Wat. Code, §13170; *San Joaquin Tributaries Authority v. California State Water Resources Control Board* (2019) Sacramento County Superior Court, Case No.: 34-2019-80003133, Page 4 of 13, [‘... , Section 13170 only authorizes the State Board to formulate WQCPs for waters of the United States, not other waters subject to Porter-Cologne.’].)

“Separate and apart from adopting water quality control plans for waters of the United States, the State Board does have authority to adopt statewide policy for water quality control. (Wat. Code §13140.) However, there are distinct differences between policies adopted pursuant to Water Code section 13140 and water quality control plans adopted pursuant to Water Code section 13240 et seq. ‘The difference between the policies under Section 13140 and WQCPs is even clearer when considering the disparate elements comprising each. WQCPs consist of beneficial uses to be protected, water quality objectives that protect such uses and a program of implementation.’ (*San Joaquin Tributaries Authority v. Cal. State Wat. Board*, citations omitted, page 5 of 13.).

“When adopting statewide control policies, the State Board may include water quality objectives at key locations for planning and operation of water resource development projects and for water quality control activities. (Wat. Code, §13142(b).) However, beyond including water quality objectives for water resource development projects, the State Board does not have authority to adopt water quality control plans that include non-waters of the United States. (*San Joaquin Tributaries Authority v. Cal. State Wat. Board*, page 5 of 13, [‘In short, it is clear from the statutory text that a policy established pursuant to Section 13140 may not serve as a WQCP.’].).”

**“Proposed Action to Adopt Toxicity Provisions Under Water Code Section 13140 et seq. Violates Porter-Cologne**

Because Porter-Cologne limits the State Board’s authority to adopt water quality control plans for non-waters of the United States, State Board staff now recommends that the State Board take action to convert its previous adoption of the Toxicity Provisions as part of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California to adoption of the same provisions as state policy for water quality control under Water Code section 13140, et seq. via the Draft Resolution. The proposed action as set forth in the Draft Resolution suffers from the same infirmities as

its previous action that was enjoined by the Sacramento Superior Court in the *San Joaquin Tributaries Authority* case as it applies to non-waters of the United States.

“Unlike the Wetlands Policy where a similar conversion action was taken via Resolution, the Toxicity Provisions here include water quality objectives that apply to all surface waters, identifies the applicable beneficial uses that the objectives apply to, and contain a detailed Program of Implementation. In other words, the elements of the Toxicity Provisions are the same as those that are part of a water quality control plan by definition. (Wat. Code, §13050(j).) Conversely, the Toxicity Provisions are not consistent with the principles and guidelines that control the content of state policy for water quality control. Section 13142 states that state policy for water quality control shall consist of all or any of the following principles: principles and guidelines for long-range resource planning, including groundwater and surface water management programs and use of recycled water; water quality objectives at key locations for planning and operation of water resource development projects and for water quality control activities; or, other principles and guidelines deemed essential by the state board for water quality control. (Wat. Code, § 13142.) Absent from these principles and guidelines are reference to beneficial uses and programs of implementation for meeting water quality objectives. More importantly, the Toxicity Provisions fail to look anything like the principles and guidelines set forth in Section 13142.”

**RESPONSE:** See Revised 2021 Response to Comments numbers 1.2, 1.3, and 1.4.

2.4. **COMMENT:** “Next, as part of the rationale for using Section 13140 et seq., the Draft Resolution and Revised Draft Final Report improperly reference *WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1460, as the legal authority that state policy can supersede conflicting provisions in regional water quality control plans. Reliance on *WaterKeepers Northern California* is misplaced for several reasons. First, the case pertains to compliance determinations for those subject to NPDES permits (i.e., discharges to waters to the United States). Second, the court construed the provisions in question very narrowly for the purposes of defining reporting requirements and providing a guideline for enforcement. (*WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1460.) Based on this narrow reading of the provisions, the court then determined it reasonable to find that the State Board intended these provisions to apply to Regional Board compliance determinations and supersede conflicting basin plan provisions. (Id.) Nothing in this case suggests that the State Board may adopt new water quality objectives and programs of implementation for non-waters of the United States as state policy and have these provisions then supersede conflicting provisions in regional board water quality control plans. Accordingly, the State Board should not rely on the *WaterKeepers* case to support use of Section 13140 as a means for adopting water quality control plan ‘like’ provisions for non-waters of the United States.”

**RESPONSE:** See Revised 2021 Response to Comments numbers 1.3 and 1.4.

2.5. **COMMENT: “Conclusion**

“In summary, we request that the State Board re-evaluate the proposed action based on the rationale provided and look to adopt the Toxicity Provisions in accordance with the intent and purposes of the Porter-Cologne Act. This means that the State Board may only adopt the Toxicity Provisions as a water quality control plan for waters of the United States and must defer any action to the regional water boards for the adoption of the Toxicity Provisions (or any future similar actions) as they would apply to waters of the state that are not waters of the United States (hereafter ‘non-waters of the U.S.’).”

**RESPONSE:** See Revised 2021 Response to Comments numbers 1.2, 1.3, and 1.4. It is not necessary to defer any action to the Regional Water Board for the adoption of the Toxicity Provisions.

**Comment Letter #3 – Downey Brand on behalf of the Southern California Alliance of Publicly Owned Treatment Works (SCAP) (Melissa A. Thorne)**

3.1. **COMMENT:** “First, we note that this regulatory proposal initially was put forward as a Statewide Policy since as early as 2008 and was specifically modified from that trajectory in 2018 when the State Board formally changed to a Water Quality Control Plan/Basin Plan document to allow its provisions to supersede portions of regional Basin Plans that conflict with the Policy. (See Summary of Changes from Draft June 2012 Toxicity Policy to Draft October 2018 Toxicity Provisions, [https://www.waterboards.ca.gov/water\\_issues/programs/state\\_implementation\\_policy/docs/policy\\_plan\\_change.pdf](https://www.waterboards.ca.gov/water_issues/programs/state_implementation_policy/docs/policy_plan_change.pdf).) Thus, it seems counter-intuitive that the State Board would now propose to return to its initial path, except to address a legal determination related to the Wetlands Provisions that the State Board exceeded its legal authority.”

**RESPONSE:** The 2018 draft version of the Toxicity Provisions and Staff Report were proposed under the authority of both Water Code section 13170 and section 13140. The Summary of Changes from Draft June 2012 Toxicity Policy to Draft October 2018 Toxicity Provisions indicates that only statewide plans automatically/directly supersede conflicting portions of basin plans. It does not suggest that the State Water Board cannot determine that policies supersede applicable regional basin plan provisions. Since 2018, every draft Toxicity Provisions and draft Staff Report released for public comment indicated that the Toxicity Provisions would be adopted under both section 13170 and section 13140. On December 1, 2020, the State Water Board adopted the Toxicity Provisions using the authority of both Water Code section 13170 and section 13140. In State Water Board Resolution No. 2020-0044, the State Water Board indicated that policies for water quality control may supersede conflicting provisions in regional water quality control plans where the State Water Board determines it is appropriate. The proposed Resolution and attachments confirm the Toxicity Provisions were adopted under both Water Code section 13170 and section 13140 and clearly indicate the State Water Board’s determination that it is appropriate that the Toxicity Provisions supersede

applicable portions of basin plans. The Superior Court in *San Joaquin Tributaries Authority v. California State Water Resources Control Board* issued a judgment and writ enjoining the State Water Board from applying the 'State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State' ("the Procedures") via the ISWEBE Plan to non-federal waters. The court did not limit the State Water Board's policy authority or prohibit the Board from relying on both Water Code section 13170 and 13140 authority in conjunction. See Revised 2021 Response to Comments numbers 1.2 through 1.4.

- 3.2. **COMMENT:** "If now proceeding under Water Code 13140, the State Board's actions must ensure conformance with all Chapter 1 requirements (commencing with Water Code section 13000), which is not apparent from the record."

**RESPONSE:** Conformity with the policies set forth in Chapter 1 (commencing with section 13000) is not limited to State Water Board actions taken under Water Code section 13140, as seems to be suggested by the commenter. The State Water Board may adopt water quality control plans in accordance with the provisions of sections 13240 to 13244 (see Water Code section 13170). Water Code section 13240 states that water quality control plans shall conform to the policies set forth in Chapter 1 (commencing with Section 13000). Indeed, the State Water Board in exercising any power granted associated with water quality control must conform with the policies set forth in Chapter 1. (Cal. Water Code § 13001.) As such, the comment is not associated with the proposed resolution and is considered out of scope of this comment period. Furthermore, the commenter has not identified any specific policy that has not been complied with by the State Water Board.

In any case, the commenter's suggestion that the proposed resolution somehow creates a deficiency in the record is inaccurate. The Toxicity Provisions were adopted using authority under Water Code section 13140 and Water Code section 13170. In adopting the Toxicity Provisions, the State Water Board conformed with the policies of Chapter 1. The record is rife with discussion on how the State Water Board's actions protect the quality of the waters of the state for use and enjoyment by the people of the state (e.g., Chapter 5 of the Staff Report), attains the highest water quality which is reasonable (e.g., Chapter 5 and Chapter 9 of the Staff Report), protects the quality of waters in the state from degradation (e.g., Chapter 9 of the Staff Report), provides a framework of statewide coordination and policy (e.g., Chapter 5 of the Staff Report), and achieves a unified and effective water quality program in the state (e.g., Chapter 5 of the Staff Report).

In developing, considering, and adopting the Toxicity Provisions, the State Water Board complied with the procedural requirements applicable to actions taken under both Water Code sections 13140 and 13170. Also see Revised 2021 Response to Comments numbers 1.2, 1.3, and 1.4 for further explanation on how the Toxicity Provisions are within the scope of actions contemplated in Porter-Cologne for state policy for water quality control under the authority of Water Code section 13140.

- 3.3. **COMMENT:** “Second, and more importantly, this modification requires more than just a quick and simple resolution from the State Board. All of the environmental analysis must be modified because a statewide Policy does not enjoy the same exemptions under the California Environmental Quality Act (CEQA) as basin planning. Only water quality control (Basin) plans enjoy the exemption for Certified State Regulatory programs under CEQA regulations at section 15241(g), not statewide policies.

“The Supplemental Environmental Document (SED) adopted with the Toxicity Provisions relied upon Water Code section 13170 not only to supersede regional Basin Plans (SED at pp. ix, 42, 321), but also to receive the exempt regulatory program status under CEQA (SED at p. 30 citing Title 14, section 15251(g)) so that ‘a separate CEQA document will not be prepared.’ (SED at p. 31.) Without that regulatory exemption, the State Board must fully comply with CEQA and cannot rely upon the SED.”

**RESPONSE:** State polices for water quality control are within the scope of the exempt regulatory program. See Revised 2021 Response to Comment number 1.5.

- 3.4. **COMMENT:** “In its review of its CEQA obligations and modifications to any CEQA documents, SCAP hopes the State Board will explore the other feasible and reasonable alternatives requested by SCAP, including but not limited to: use of narrative objectives akin to the Trash Provisions; use of the federally promulgated toxicity requirements pursuant to 40 C.F.R. section 136 (e.g., point estimates and NOEC/NOEL instead of unpromulgated TST); inclusion of compliance schedules to attain new water quality objectives as required by Water Code section 13242(b) and the Clean Water Act at section (e)(3)(F), modified reasonable potential analysis requirements, different more reliable test species, and increased monitoring flexibility. The State Board must also consider the impacts of not having consistent Basin Plan requirements statewide, which was one of the main reasons for adopting this Policy in the first place.<sup>1</sup>

“Footnote 1: Although the State Board has previously cited *Waterkeepers v. State Water Board*, 102 Cal.App.4th 1448, 1460 (2002) for the proposition that a statewide policy may supersede conflicting Basin Plans, that case represents dicta as it only recognized with quotations that the State Board’s State Implementation Policy (SIP) ostensibly did so and the Court did not rule as to whether that action was legal or not. (*Id.* at 1460 (‘In light of the supervisory relationship of the State Board to Regional Boards, it is reasonable to suppose that the State Board *intended* the provision to apply to compliance determinations by Regional Boards.’)(italics added).”

**RESPONSE:** As explained in Revised 2021 Response to Comments number 1.5, state polices for water quality control are within the scope of the exempt regulatory program and an SED is the appropriate environmental documentation for the Toxicity Provisions. The proposed Resolution does not require major revisions to the SED. Furthermore, the State Water Board identified no potentially significant effects from the reasonably foreseeable methods of compliance or the project. Instead Chapter 8 of the Staff Report includes a discussion of the alternatives that would avoid or substantially lessen the potentially significant impacts from the construction, operation, and maintenance of

possible toxicity controls. This discussion is included for purposes of informing decision makers and the public of any possible effects, however unlikely, and associated project alternatives. The commenter has not identified how the proposed Resolution would create significant impacts to the environment requiring a reevaluation of alternatives or major revisions to the SED.

Therefore, the comment on alternative project options is outside of the scope of this comment period. However, please see previous responses to comments and the Staff Report for further information on why numeric objectives were selected as the preferred project option, on how requiring use of the test of significant toxicity is not a change to a promulgated test method, on how the reasonable potential analysis requirements were selected, on why the test methods for the species in Table 1 of the Toxicity Provisions are reliable, how the frequency of monitoring provides a consistent and protective measure of toxicity, and on how the Toxicity Provisions do not change the State Water Board's current compliance schedule policy, adopted under Resolution No. 2008-0025.

The proposed Resolution will not create inconsistent requirements. The proposed Resolution does not change the substantive requirements of the Toxicity Provisions and the Toxicity Provisions would continue to provide a consistent statewide framework for protecting aquatic life from toxicity. For further response on the State Water Board's determination that the Toxicity Provisions supersede provisions of the basin plans of the Regional Water Boards, please see Revised 2021 Response to Comments numbers 1.2, 1.3, and 1.4.

- 3.5. **COMMENT:** "The current SED suffers from many inadequacies including that the State Board failed to adequately identify and address the potential significant environmental effects that included, but were not limited to: 1) significantly more monitoring requirements that could adversely impact the capacity of laboratories and increased impacts from the additional vehicle miles traveled to deliver samples to accredited laboratories for results; 2) significant impacts to public wastewater treatment plants that may require additional monitoring and/or treatment technologies that may or may not resolve any toxicity indications seen; 3) impacts on businesses and public entities related to enforcement actions that may result, even in cases of false indications of toxicity. The SED also ignored public comments that contained substantial evidence indicating significant environmental and economic impacts will occur, particularly on governmental entities. No reasonable alternatives or mitigation measures were required or implemented to address these impacts since the State Board failed to recognize the potential impacts in the first place or claimed the impacts were too speculative to address. SCAP hopes these issues can be resolved in any modifications made to the required environmental documents and the Policy itself."

**RESPONSE:** The commenter has not identified how the proposed Resolution would create significant impacts to the environment requiring major revisions to the SED. See Revised 2021 Response to Comments number 1.5. Comments associated with the inadequacy of the SED adopted in December 1, 2020, are outside of the scope of the

comments to be accepted in this comment period. However, the commenter is inaccurate in the portrayal of the Board's environmental analysis.

Potential impacts related to a possible increase in monitoring, testing, and laboratory analysis were considered in the SED. State Water Board staff conducted an analysis of the change in the number of sampling trips and miles traveled for toxicity testing under the Toxicity Provisions compared to current requirements, regardless of the sampling frequency for other constituents. A representative sample was used because the wide variety of toxicity requirements currently in effect throughout the state, coupled with the discretionary authority granted in the Toxicity Provisions render a statewide environmental assessment of the Toxicity Provisions infeasible and speculative. The increase in miles traveled for the representative sample is 0.0003 percent of the annual statewide increase of vehicle miles. Therefore, any increase in sampling trips will have a less than significant impact on air quality.

The SED also includes an analysis of the potential laboratory impacts (disposal of test water and test species) expected to occur on a routine basis from the Toxicity Provisions, and the possible impact on landfills or wastewater treatment. Existing monitoring requirements of the sample set of dischargers were compared to those monitoring requirements expected to result from the Toxicity Provisions. Estimates of the foreseeable changes between the two were made using two monitoring parameters: number of toxicity tests and number of test chambers required.

Although the amount of waste and resource use may increase for a given discharger, the impacts from the facilities that could see an increase in toxicity tests are expected to be less than significant. This is because the quantity of laboratory water, test species, and test species food required for tests is minimal overall.

Enforcement actions for violations of National Pollutant Discharge Elimination System (NPDES) permits protect the environment by incentivizing dischargers to reduce the toxic effects of their discharge. As discussed in more detail in Chapter 6 and 7 of the Staff Report, the possibility that any given discharger would implement a specific toxicity control as a method of complying with toxicity effluent limitations, toxicity reduction evaluations, receiving water limitations or other requirements in the Provisions is speculative. The Water Boards do not mandate the manner of compliance (see Water Code section 13360(a)), so any discharger that chooses to implement a toxicity control is free to select any particular toxicity control or combination of toxicity controls.

Section 5.4.3 of the Staff Report acknowledges that the Toxicity Provisions will likely lead to an increase in the number of violations of effluent limitations, because many current non-storm water NPDES permits lack effluent limitations for chronic or acute aquatic toxicity. It is important to note that violations of effluent limitations do not automatically subject a discharger to mandatory minimum penalties. However, since it is not possible to predict which facilities may have violations, or how often, or what penalties may be assessed if there is a violation, any attempt to estimate costs associated with increased violations would be purely speculative. In addition, it is not

possible to predict the cause of aquatic toxicity or the solution for each discharger. Chapter 6 of the Staff Report discusses several possible toxicity controls that may be used to reduce or eliminate toxicity in an effluent, but costs for these controls will vary by the volume of discharge and the type of control used. Furthermore, costs to the discharger associated with non-compliance is not an effect on the environment requiring analysis under CEQA.

The State Water Board considered previously submitted public comments on the SED and determined that the comments did not include substantial evidence, if any evidence, that significant impacts would occur from the project. A response to those comments has already been provided. The State Water Board considered the effects to the environment that would result from applying the Toxicity Provisions to all waters of the state. The State Water Board is not required to conduct further CEQA documentation.

- 3.6. **COMMENT:** “Given these concerns, SCAP recommends that the State Board not adopt the proposed resolution until these legal issues are resolved.”

**RESPONSE:** As further explained in Revised 2021 Response to Comments numbers 3.1 through 3.5, delayed adoption of the proposed Resolution is unnecessary.

**Comment Letter #4 – General Public (Robyn Stuber)**

- 4.1. **COMMENT:** “I recently noted your June 25, 2021 public notice draft resolution proposed to securely advance the Toxicity Provisions adopted by the State Water Board on December 1, 2020. I commend your leadership and team of expert staff, who have worked tirelessly to secure a sound legal underpinning for these important Provisions.”

**RESPONSE:** The commenter’s support of this resolution is noted.

- 4.2. **COMMENT:** “Your legal notice prompted me to again read portions of the FED. While doing this—in relation to its analyses of toxicity lab performance for *C. dubia* reproduction and Fox et al. 2019—I noted the FED unmasked the names of some, but not all, California toxicity labs analyzed by Fox et al. This seems to create unnecessary opacity with respect to your analyses of lab long run control CVs now being conducted under the *C. dubia* reproduction study. Also, I feel the absence of such complete information could make more difficult the work being done by your Expert Science Panel. However, all this information is accessible to the public. For Fox et al., please note Lab names and letter codes are shown together in the dataset hosted by EPA, here:

<https://edg.epa.gov/metadata/catalog/search/resource/details.page?uuid=%7B42B7AB9D-EB34-43AF-91AB-C072E900969F%7D>. I have downloaded this file (accessed 2021-07-24 at 3:26 pm EDST), download URL:

<https://pasteur.epa.gov/uploads/10.23719/1376211/crc-merged.xlsx>. Attached is the EPA file containing unmasked lab names in Fox et al., for your convenience.”

**RESPONSE:** Comments regarding the *Ceriodaphnia dubia* Study are outside the scope of the comments the State Water Board will receive for its consideration on the proposed Resolution. Further information regarding the *Ceriodaphnia dubia* Study is available on the State Water Board’s toxicity program page:  
[https://www.waterboards.ca.gov/water\\_issues/programs/state\\_implementation\\_policy/tx\\_ass\\_cntrl.html](https://www.waterboards.ca.gov/water_issues/programs/state_implementation_policy/tx_ass_cntrl.html).

**Comment Letter #5 – California Coastkeeper Alliance and Heal the Bay (Kaitlyn Kalua and Annelisa Moe)**

5.1. **COMMENT:** “Our organizations were deeply involved in the development of the Toxicity Provisions and remain committed to its full and robust implementation following the completion of the *Ceriodaphnia dubia* Toxicity Testing Study. Delaying or preventing the implementation of the Toxicity Provisions due to the January 26, 2021 California Supreme Court decision in *San Joaquin Tributaries Authority v. California State Water Resources Control Board* is not necessary, given the State Water Board relied on, in part, Water Code section 13140 and it was widely understood that the Provisions were adopted as state policy to ensure consistent implementation of toxicity requirements statewide.”

**RESPONSE:** The commenter’s support of this resolution is noted.

5.2. **COMMENT:** “Prior to the State Water Board’s adoption of the Toxicity Provisions, a number of the Regional Water Boards had begun to incorporate numeric toxicity limitations into regulatory permits to address, detect, and manage toxicity. This implementation however, has been inconsistent and incomplete statewide and necessitated the State Water Board’s development and adoption of the Toxicity Provisions Further, given that California waterbodies in all nine regions have experienced and continue to experience chronic toxicity the timely implementation of these Provisions as state policy is needed to ensure that both known and unknown sources of toxicity are detected and ultimately addressed.”

**RESPONSE:** Comment noted.

5.3. **COMMENT:** “We further appreciate that the State Water Board is not reopening the Toxicity Provisions or accepting comments on the substance of the Provisions. The Toxicity Provisions, while imperfect, were developed through a transparent, public process over the course of nearly two decades with countless opportunities for public participation. The State Water Board carefully crafted the final Toxicity Provisions with a number of concessions to address myriad stakeholder concerns, and reopening issues that have already been before the State Water Board is unnecessary and would be unproductive at this time.”

**RESPONSE:** Comment noted.

**Comment Letter #6 – City of San Diego, Public Utilities and Storm Water Department (Sumer Hasenin)**

- 6.1. **COMMENT:** “The City of San Diego, Public Utilities and Storm Water Departments (City) appreciate the opportunity to provide comments on the proposed Toxicity Provisions Resolution No. 2021-XX incorporating the provisions into the Inland Surface Waters, Enclosed Bays and Estuaries Plan.”

**RESPONSE:** The proposed Resolution would not incorporate the Toxicity Provisions into the ISWEBE Plan. The proposed Resolution would rescind the establishment of the ISWEBE Plan. The portions of the Toxicity Provisions that apply to waters of the United States will continue to apply to waters of the United States and will be incorporated into the ISWEBE Plan coincident with, or subsequent to, the State Water Board’s establishment of the ISWEBE Plan in the future.

- 6.2. **COMMENT:** “The City supports the adoption of the proposed Toxicity Provisions Resolution, with one suggested change. The City recommends inclusion of Resolution number 21 from the Toxicity Provisions Resolution 2020-0044, adopted on December 1, 2020 for the Inland Surface Waters, Enclosed Bays, and Estuaries Plan, as further described below. Resolution number 21 provides the opportunity for the Southern California Coastal Water Research Project, or SCCWRP, to develop laboratory testing methods that will ensure that laboratory results are accurate and reliable. The City requests and supports the continuation of Resolution number 21 in proposed Resolution No. 2021-XX. The Resolution 2020-0044 item #21 is cited below for your reference:

‘The chronic *C. dubia* reproduction toxicity test is a reliable test and is essential in protecting California’s surface waters from toxicity. Due to the need to build stakeholder and public confidence in laboratory performance when conducting the chronic *C. dubia* test method for median monthly effluent limitation (MMEL) compliance purposes, it is appropriate to include a short-term delay in the statewide implementation of the *C. dubia* MMEL, as long as it is consistent with federal law for each permit. In the long-term, mandating a statewide maximum daily effluent limitation and MMEL using *C. dubia* is essential to restrict pollutants and provide the appropriate incentive for dischargers to address the causes of toxicity, and ultimately protect beneficial uses.’ ”

**RESPONSE:** The proposed Resolution does not propose any changes to Finding number 21 of Resolution 2020-0044. Resolved paragraph number 7 of the proposed Resolution confirms that all other portions of Resolution No. 2020-0044 are unchanged by the proposed Resolution. Therefore, explicitly including Finding number 21 into the proposed Resolution is not needed.

**Comment Letter #7 – Los Angeles Department of Water and Power (Katherine Rubin)**

7.1. **COMMENT:** “Although the State Water Board initially (in 2012) envisioned adopting the Toxicity Provisions as a policy, in 2018, the State Water Board directed staff instead to adopt the Toxicity Provisions ‘as a water quality control plan.’<sup>1</sup> The State Water Board noted that

‘the draft 2012 Toxicity Policy was proposed as a water quality control policy. A policy does not directly supersede portions of Basin Plans that conflict with the policy. Therefore, the Regional Board may be given direction or required to take some action, such as amending the Basin Plan.’

“The 2018 summary of changes also states that the 2012 Toxicity Provisions (adopted as a policy) would have ‘not superseded the narrative water quality objectives in the regional Basin Plans’ (emphasis added).<sup>3</sup>

“In contrast, the State Water Board’s 2018 document noted that the Toxicity Provisions (established as a ‘water quality control plan’) would ‘establish a statewide program of implementation, which supersedes those portions of the Basin Plans that are in conflict with the statewide plan.’<sup>4</sup>

“The proposed Resolution accompanying the June 2021 notice would now rescind the Toxicity Provisions established as part of the ISWEBE Water Quality Control Plan and ‘confirm’ that the Toxicity Provisions were adopted as state policy. Shown below are LADWP’s comments on this approach.”

**RESPONSE:** The Summary of Changes from Draft June 2012 Toxicity Policy to Draft October 2018 Toxicity Provisions indicates that only statewide plans automatically/directly supersede conflicting portions basin plans. It does not suggest that the State Water Board cannot determine that policies supersede applicable regional basin plan provisions. For further explanation on how the State Water Board can make a determination to have the Toxicity Provisions, as a state policy for water quality control, supersede provisions of regional water quality control plans, see Revised 2021 Response to Comments numbers 1.2, 1.3, 1.4 and 3.1.

The proposed resolution does not change which applicable basin plan provisions will be superseded by the Toxicity Provisions, nor does it change the substantive requirements of the Toxicity Provisions. As such, comments on the differences between the basin plans and the toxicity provisions are considered out of scope of this comment period. In any case, please see the Toxicity Provisions, previous responses to comments, and the Staff Report for further information on how the Toxicity Provisions do not supersede narrative aquatic toxicity water quality objectives in the basin plans.

7.2. **COMMENT: “1. Toxicity Provisions Resolution No. 4, (p. 6) - The Toxicity Provisions appear to conflict with Basin Plan requirements.**

“The proposed Resolution asserts that ‘it is appropriate for the Toxicity Provisions, as state policy for water quality control, to supersede any conflicting provisions in regional water quality control plans.’<sup>5</sup> However, it is not clear, based on the State Water Board’s prior analysis of this issue in 2018 and LADWP’s review of Porter-Cologne, that the State Water Board has this authority, or that the Toxicity Provisions, if adopted as a policy as the State Water Board now proposes to do, would automatically (without Regional Board action) replace conflicting Basin Plan provisions.

“LADWP further notes that many of the toxicity provisions in the state’s regional Water Quality Control Plans (Basin Plans) conflict with the State Water Board’s Toxicity Provisions. For example, the Basin Plan for the Lahontan Region includes the following water quality objectives for toxicity:

‘All waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life. *Compliance with this objective will be determined by use of indicator organisms, analyses of species diversity, population density, growth anomalies, bioassays of appropriate duration and/or other appropriate methods as specified by the Regional Board.*’

‘The survival of aquatic life in surface waters subjected to a waste discharge, or other controllable water quality factors, shall not be less than that for the same water body in areas unaffected by the waste discharge, or when necessary, for other control water that is consistent with the requirements for ‘experimental water’ as defined in *Standard Methods for the Examination of Water and Wastewater* (American Public Health Association, et al. 2012, or subsequent editions).’<sup>6</sup>

“The Lahontan Region Basin Plan also references toxicity units that are inconsistent with the Toxicity Provisions and TST. For example, the Basin Plan section on ‘Standard Analytical Methods to Determine Compliance with Objectives’ describes ‘suitable analytical methods’ as those that are specified in 40 CFR Part 136, and/or methods determined by the Regional Board and approved by USEPA to be equally or more sensitive than 40 CFR Part 136 methods, and/or, where methods are not specified in 40 CFR Part 136, those methods determined by the Regional Board to be appropriate for the sample matrix.<sup>7</sup> This section of the Basin Plan also references ‘chronic toxicity units’ (which are not measured or generated by the TST) and requires all test results to be reported to the Regional Board in accordance with the “Standardized Reporting Requirements for Monitoring Chronic Toxicity’ (State Board Publication No. 93-2 WQ).’ (Lahontan Basin Plan at p. 3-17)

“To illustrate LADWP’s concerns, see Figure 1. The toxicity water quality objectives in the Lahontan Region Basin Plan (and others in the state) reference the ‘EPA Original Method’ (left box). The Toxicity Provisions incorporate significant changes to the EPA Original Method, including changes to the requirements to analyze a full dilution series and changes to the statistical method used to interpret toxicity test data (center box).

“Additionally, in November 2020, the State Water Board submitted an Alternative Test Procedure (ATP) request to the US EPA that would further modify toxicity testing to allow analysis of a control and a single effluent sample (‘one-effluent concentration’), rather than a control and a dilution series consisting of different concentrations of effluent (right box). The ATP is not incorporated within the Toxicity Provisions, and it is unclear whether and how the ATP, if granted, would apply to (or supplant) the requirements of regional Basin Plans. The changes illustrated in Figure 1 are significant departures from the toxicity objectives included in Basin Plans across the state.

{See Figure 1 on page 4 of the LADWP Comment Letter}

“**Figure 1.** Graphic showing major features of EPA’s toxicity test methods, which are the basis for water quality objectives for toxicity in certain regional Basin Plans (left box); the State Water Board’s Toxicity Provisions, which modify EPA’s test methods (center box), and the Toxicity Provisions and toxicity test methods if/after EPA approves an Alternative Test Procedure (ATP).

“LADWP requests that the State Water Board clarify the concerns mentioned above regarding inconsistencies between the Basin Plan and the Toxicity Provisions. Further, LADWP requests the State Water Board specify the authority under the Porter-Cologne act that allows the Toxicity Provisions as a policy to replace conflicting Basin Plan Provisions.”

**RESPONSE:** The Water Code does not limit the State Water Board’s discretion to rely on both its policy and plan authority. Furthermore, the Toxicity Provisions are within the scope of actions contemplated in Porter-Cologne for state policy for water quality control under the authority of Water Code section 13140. For further response, see Revised 2021 Response to Comments numbers 1.2 through 1.4. For further explanation on how the State Water Board can make a determination to have the Toxicity Provisions, as a state policy for water quality control, supersede provisions of regional water quality control plans, see Revised 2021 Response to Comments numbers 1.2, 1.3, 1.4 and 3.1.

The proposed resolution does not change which applicable basin plan provisions will be superseded by the Toxicity Provisions, nor does it change the substantive requirements of the Toxicity Provisions. As such, comments on the differences between the basin plans and the toxicity provisions and the relationship of the proposed ATP with the

Toxicity Provisions are not associated with the proposed resolution and are considered out of scope of this comment period. In any case, please see previous responses to comments, the Staff Report, and the Toxicity Provisions for further information on which applicable basin plan provisions will be superseded. Furthermore, Appendix E of the Staff Report shows examples of portions of basin plans that will be superseded. In addition, please see previous responses to comments and the Staff Report for an explanation of why the statistical approach, including the TST, is not part of the test method, why an alternative test procedure (ATP) is not part of the Toxicity Provisions, and why the Toxicity Provisions do not rely on an ATP for implementation.

**7.3. COMMENT: “2. Toxicity Provisions Resolution No. 19, (p. 5) – The CEQA exemption claimed for the Toxicity Provisions appears to apply to basin planning activities and not to policy development.**

“The Draft Resolution states that ‘the adoption of this resolution is not subject to CEQA because there will be no effects on the environment.’<sup>8</sup> However, notices sent to the public after 2018 explicitly noted that the Toxicity Provisions would be adopted as a ‘water quality control plan.’ The Staff Report for the Toxicity Provisions notes that ‘The Secretary for Natural Resources has certified as exempt the State Water Board’s Basin/208 Planning Program for the protection, maintenance, and enhancement of water quality in California. (Cal. Code Regs., tit. 14 § 15251(g)).’<sup>9</sup>

“Because the exemption applicable to basin planning activities appears not to apply to policy development, it appears that the State Water Board must comply with the requirements of the California Environmental Quality Act (CEQA) if the Toxicity Provisions are adopted as a policy.

“LADWP requests that the State Water Board consider additional alternatives to the Toxicity Provisions as proposed by LADWP and other commenters, including (but not limited to) (1) allowing dischargers to collect information from the full dilution series and use this dose-response information to assist with the interpretation of toxicity test results made using the TST method; (2) evaluating alternatives to the reasonable potential procedures that are consistent with the statistical evaluations used in the Toxicity Provisions; (3) allowing a single sample to be used for both routine monitoring and compliance testing; (4) allowing flexibility in monitoring schedules; and (5) evaluating alternatives to address issues that arise due to differences in salinity.

“LADWP requests that the State Water Board redo their CEQA analysis on the Toxicity Provisions given the CEQA exemption originally used applies to basin planning activities and not policy development. With the shift from a plan to a policy, CEQA should be reevaluated and should either forgo an entire CEQA analysis or be categorized under a separate exemption.”

**RESPONSE:** See Revised 2021 Response to Comments numbers 1.2, 3.4, and 3.5. The commenter has not identified how the proposed Resolution would create significant impacts to the environment requiring a reevaluation of alternatives or major revisions to the SED. Therefore, the comment on alternative project options is outside of the scope of this comment period. However, please see previous responses to comments and the Staff Report for further information on why analysis of the full dilution series is unnecessary when using the TST, on the reasonable potential analysis, on monitoring frequency, and on salinity.